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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 168

SALVATORE BATTAGLIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Salvatore Battaglia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1968. (App. 66a). A motion to remand to determine the extent of electronic eavesdropping was denied on April 10, 1968. (App. 44a). Petition for rehearing was denied on April 17, 1968. (App. 67a). On May 6, 1968, Mr. Justice Marshall extended the filing time to and including June 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May federal criminal jurisdiction be sustained under the conspiracy to extort provisions of the Hobbs Act without a showing, independent of the rule of vicarious guilt, that a defendant specifically contemplated or would have tolerated the behavior of a co-defendant alleged to constitute the extortion?

2. Whether, under *Dennis* v. *United States,* 384 U.S. 855 (1966), to obtain the grand jury testimony of a key government witness at trial, a conspiracy defendant must do more than request the prior testimony for cross-examination purposes? When a Circuit first gives effect to *Dennis,* may it deny application to trials held after *Dennis* by announcing a Circuit rule prospectively?

3. Whether, under *Smith* v. *Illinois,* 390 U.S. 129 (1968), counsel may be denied the opportunity to ask a key government witness where he lives now?

4. Whether *in camera ex-parte* inspection by the Court of Appeals of materials the Government monitored illegally comports with this Court's order in *Kolod* v. *United States,* 390 U.S. 136 (1968).

STATUTES INVOLVED

18 U.S.C. § 1951, reads in part:

"§ 1951. *Interference with commerce by threats or violence.* (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States had jurisdiction."

INTRODUCTORY STATEMENT

"Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." (Harlan, J.). *Grunewald* v. *United States,* 353 U.S. 391, at 404 (1957). This case presents an opportunity for the Court to give substance to its repeated warnings.

Petitioner was convicted under the Hobbs Act of conspiring to extort, without a trace of a showing that he ever contemplated or would have tolerated the threats alleged to constitute extortion. On the novel theory that the conspiracy was of "indefinite outline", acts and declarations of alleged co-conspirators were swept into evidence against him without any *independent proof* that he agreed to or would have tolerated such behavior. This new conspiracy "net" also unlawfully expands the reach of the Hobbs Act, since federal jurisdiction under that Act is otherwise limited by the statute to "[i]nterference with commerce by threats or violence".

The case also presents other questions of general importance: disclosure of grand jury minutes; the scope of *Smith* v. *Illinois,* 390 U.S. 129 (1968); procedures for determining the impact of Government eavesdropping. The relevant facts are stated in connection with each question presented.

STATEMENT OF THE CASE

The substance of the indictment was that petitioner Battaglia and defendants Evans and Amabile conspired to extort $48,500 from William Riley, President of the Riley Management Corporation, constructing apart-

ments in Lansing, Illinois. (R. 19-21).[1] The case against petitioner rested entirely upon attributing to him, by means of the rule of vicarious guilt, the threatening acts and declarations of co-defendant Amabile. Since this petition contends that there was *no* basis for invoking that rule, the critical evidence pertaining to petitioner Battaglia must be recounted. For convenience, a condensed and chronological summary is presented here, but petitioner otherwise relies upon the summary given in the majority opinion for the Court of Appeals and viewed in the light most favorable to the government (App. 1a).

In June, 1964, Riley asked defendant Evans to line up subcontractors for sewer work at Lansing, but to keep the job secret from defendant Amabile (also known as Joe Shine) and others. (R. 502). A few days later, however, Amabile demanded the plumbing contract of Riley and threatened to use a baseball bat to get it. (R. 506-07).

Early in the summer, Amabile told Rocco Pranno, and Mike DiVito, a sewer contractor that the Lansing work could not be obtained if their names were on the contract.[2] They had to come up with a "good clean guy". (R. 124). Accordingly, in order to deceive Riley, Pranno and DiVito hired Henry La-Key and set up the Carlson Construction and Equipment Corporation with La-Key as nominal president. (R. 126, 127, 130, 132). Amabile was satisfied that La-Key was

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[1] Record references are to the printed transcript of the record in the Court of Appeals, the Joint Appendix.

[2] Pranno, an alleged co-conspirator, was not made a defendant herein.

"clean", but before he agreed to the arrangement, he demanded that $20,000 be available for him. (R. 128).

At about the same time, Evans told Riley that he had selected the Carlson Company because it was run by La-Key and its reputation was excellent. (R. 516). The contract was then awarded to Carlson under an arrangement whereby Carlson would be paid through pay-out slips issued by Riley's company. (R. 519).

When work began in the fall, Amabile told La-Key that Evans was his man in Riley's office and that DiVito should be kept away from the construction site because if Riley's men saw DiVito there, Evans would be in trouble. (R. 281). On Amabile's instructions, La-Key prepared the papers for the first pay-out draw. Evans approved the papers so that the "clean" La-Key might present them to Riley for approval. (R. 300, 301). After approval, La-Key received the first draw and deposited most of it in the Carlson account, but he later withdrew $20,000 for Amabile. (R. 303-306).

In the late fall at a farm in Illinois, Amabile introduced the "clean" La-Key to petitioner Battaglia. He described La-Key as a man "running the job for them" in Lansing. (R. 331). Amabile and Battaglia had a private conversation for twenty or thirty minutes. (R. 332). La-Key then heard petitioner ask Amabile why Evans was getting "that kind of money". (R. 332). Amabile explained "I made a deal with the man. The man got us the job. I made a deal with him. I will take care of it." (R. 332).[3] Although he had told La-Key that Evans' cut would be $5,000, Amabile told

[3] This reference to "the man" clearly points to Evans, not to Battaglia.

petitioner Battaglia that it would be $7,500.[4] (R. 297, 333).

Shortly, thereafter, La-Key told Evans that he had been to the farm and Evans warned him not to talk about it. (R. 340). Later in December, Pranno objected to Amabile that La-Key should not have been taken to the farm. But Amabile responded, "I have had him down to the farm. The man says he is okay."[5]

In January, 1965, La-Key told Evans that he needed more money to pay bills. Evans responded that he would talk to Amabile and "Joe Shine [Amabile] will talk to the man." "We will see that the money is in the bank for you."[6] Amabile then told La-Key to prepare the papers for a second draw. (R. 343). But when Amabile learned that Riley would not authorize the draw, he and La-Key went to Riley's office.[7] (R. 351-2). Riley explained why, but Amabile responded that, "the man" wanted payment and that otherwise

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[4] This is the first, but not the only indication in the record that Amabile was capable of action independent of any understanding he may have had with petitioner Battaglia. See also (R. 174).

[5] The majority opinion suggests that this reference to "the man" points to Battaglia.

[6] The majority opinion concedes that this reference to "the man" may have pointed either to Battaglia or to Riley.

[7] Riley refused authorization because Carlson had not been paying its bills. Amabile complained of that to La-Key and said that as a result he was getting in trouble with Riley and "making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's". (R. 362). La-Key told Amabile that there was no money in the Carlson account because Amabile had bled it. (R. 363). La-Key also complained to Evans and asked him why he didn't get out of the business. Evans replied: "I can't get out. I am too deep with Joe Shine. I know too much about the other people." (R. 364).

there would be "all sorts of trouble."[8] (R. 535). Riley then authorized the second draw of $48,512.48 and testified that he did so in fear of physical harm and economic ruin. (R. 538).

In late January, 1965, after the $48,000 had been obtained from Riley, (i.e., after the object of the alleged conspiracy had been achieved), Pranno told Amabile that he was going to "the farm" to see "the man". (R. 161). Still later, in February or early March, Pranno, DiVito and Amabile met at the farm with petitioner Battaglia. Pranno mentioned that $20,000 from the Lansing project was intended for Battaglia. Battaglia nodded. The second time the $20,000 was mentioned, Battaglia said "Yes". (R. 171). When Pranno spoke disapprovingly of La-Key, Battaglia said:

> " 'Well, I don't think Hank La-Key is such a bad guy, I like to work with him', that they had other

[8] The majority opinion concludes that this excerpted reference to "the man" points to petitioner Battaglia. But in its full context the reference is far from clear and, indeed, more plausibly points to La-Key as the one to whom payment was due. Riley testified that "He [Amabile] told me, 'the man' said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble . . . ." (R. 535) La-Key, also a government witness testifying to the same conversation, heard Amabile say: "The man's got his money coming, Bill [Riley], I want you to pay his money." (R. 352) Shortly thereafter, Amabile turned to La-Key and said "You'll get your money now", and then turned back to Riley and said "Don't forget, Bill I want you to pay this man". (R. 353) And ultimately, La-Key did receive a share of the second draw. (R. 360-61).

In any event, *even if every reference to "the man" in this record is properly regarded as pointing to petitioner Battaglia, there is still no evidence that petitioner authorized or would have tolerated the threats or violence required for a Hobbs Act conviction.* Petitioner may have been "the man" behind an agreement to deceive. But it does not follow that he was "the man" behind an agreement to use threats or violence.

> things coming up, and that they could use him again because he was clean." (R. 171-72).

Apparently, petitioner had no knowledge of the threats, for he still thought Riley had been deceived by the "clean" La-Key.[9]

Riley testified that he had never met petitioner Battaglia, although he had seen him once in Amabile's nightclub in early 1964. (R. 496). His attempt to substantiate that he knew petitioner as "the man" was excluded by the court. (R. 497, 581-82). Riley also testified that Amabile had threatened him in 1962, two years prior to the alleged conspiracy, in connection with work on a wholly different project in Northlake, Illinois. (R. 559-66). Amabile used the expression "the man" at that time as well, although there was no evidence linking that use of the name with the petitioner. And Riley did not testify that he understood the reference to point to Battaglia at that time. (R. 559-66).

In the absence of any evidence, then, that the petitioner ever engaged in, authorized, or would have tolerated threats or violence, Judge Julius J. Hoffman gave the instruction that permitted the jury to consider against petitioner the threatening statements and gestures made by Amabile. (R. 741-42).

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[9] Since the $48,000 had already been obtained from Riley, it is arguable that these statements by Battaglia were inadmissible. Since the object of the alleged conspiracy had been achieved, it is difficult to understand how these statements were made "in furtherance" of any conspiracy. But even if the statement was admissible, it is not evidence that Battaglia authorized or would have tolerated threats or violence. *On the contrary, it seems plain that Battaglia thought that Riley had been successfully deceived by the "clean" La-Key.*

The Court of Appeals, Judge Swygert dissenting, approved of that instruction. Most significantly, however, the court did not pretend that there was evidence, independent of the rule of vicarious guilt, that petitioner specifically participated in or would have tolerated a scheme to extort by threats or violence. Instead, the court relied upon a radical extension of conspiracy theory (App. 10a):

> "... the jury could infer that Battaglia had embarked on a criminal venture of *indefinite outline* [citation] ... Being an associate of Amabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to *take his chances* as to the methods used by the other co-conspirators." (Emphasis supplied).

REASONS FOR GRANTING THE WRIT

1. CONSPIRACY

A. "Indefinite Outline" Theory

At the heart of this case lies a theory of conspiracy law that extends beyond control both the sweep of conspiracy prosecutions in general and the reach of federal conspiracy jurisdiction under the Hobbs Act.[10] The decision below stands for a novel and wholly unwarranted proposition of conspiracy law: Upon evidence of an agreement to embark upon *some* "criminal" venture, a man is responsible for any crimes his associates may commit, even if they were beyond his

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[10] The Court may therefore exercise both its power of supervision over criminal justice in the federal courts, and its traditional vigilance over the limits that Congress has set upon federal criminal jurisdiction. *United States* v. *Gradwell*, 243 U.S. 476 (1917); *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960).

understanding and would have subverted the plan to which he did agree. He must " 'take his chances' as to the methods used by the other co-conspirators". (App. 10a).

This "indefinite outline" theory of vicarious guilt should plainly be regarded as one of the "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" that this Court has promised to "view with disfavour", *Grunewald* v. *United States,* 351 U.S. at 404 (Harlan, J.).

In this case, the theory led to a Hobbs Act conviction of a petitioner who may well have agreed to a plan to obtain money from another by deceitful means. He may well have thereby violated some state law. But he was convicted, not of an agreement to use non-violent means, but of conspiracy to extort by threats or violence. It by no means follows that one who would embark upon shady business would also cross the dark line to violence. But a conspiracy prosecution can easily sweep him across that line if this Court permits the theory used below to prevail. For all that is required is some evidence of threats or violence by someone, and some evidence that defendant participated in some shady agreement with that person. At that point, the "nets" of the doctrine employed below first expand to describe the agreement as a "criminal venture of indefinite outline", and then contract to ensnare each defendant in vicarious guilt for the threatening acts and declarations of another. He has, according to the theory, taken "his chances" on the means others would use.

The treacherous character of that theory is manifest in the present case. For even in the light most favorable to the government, the evidence of petitioner's involvement pointed, if anything, to a desire to keep

Riley unaware of the identity and character of those with whom he dealt. The Carlson Company was set up for just that purpose. And La-Key was approved as its head just because he was "clean". Indeed, more than a month after the money had been obtained from Riley, petitioner had not learned of the threats that had been made and still thought the deceit had succeeded. If any venture was proved, then, it was one of "definite outline", not subject to the Hobbs Act, that could only have been subverted by threats or violence. It does violence to common sense to suggest that petitioner took "his chances" on that.

The conspiracy theory announced below also does violence to the unquestioned requirement that the existence of the conspiracy and the defendant's connection with it must be proved by *evidence from an independent source* before the hearsay statements and acts of alleged co-conspirators may be admitted against him. *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942). "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence." 315 U.S. at 75.

Yet it is precisely the use of the bootstrap that this case would authorize. For whatever evidence there may have been of another understanding, there was no independent evidence that petitioner conspired to use extortion. He was connected to a conspiracy to extort only by ignoring the evidence of his actual understanding, and then by labelling the venture a "criminal venture of indefinite outline". Since an "indefinite outline", by definition, can embrace anything, it took only a bootstrap to say that he must have agreed to, or taken "his chances" on, the use of threats or violence. If this Court permits such a theory of conspiracy to prevail, it will have substantially discarded

the independent evidence limitation upon the techniques by which prosecutors transmit guilt vicariously in conspiracy cases.

The Court should note as well that the conspiracy theory used below is entirely unprecedented. The Court of Appeals relied upon an excerpt from *United States* v. *Andolschek,* 142 F. 2d 503, 505 (2d Cir. 1944), the case in which the term "indefinite outline" first appeared. But it was used in *Andolschek* for an entirely reasonable purpose. One appellant, convicted of conspiring to accept bribes, had argued that since his duties were quite different from the other alleged co-conspirators, he could only be convicted of a bribery conspiracy narrower in scope than the one charged.

Reversing and giving directions for a new trial, Judge Learned Hand left open the possibility that a man who has conspired to accept bribes may be a part of a larger conspiracy with others *who agree to the same means.* But nothing in his language, or in the cases that have repeated it, ever suggested that one who agrees to accept bribes or engage in deceitful activity would also be responsible for violence committed by others.[11] See *United States* v. *Kensil,* 295 F. 2d 489,

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[11] Judge Hand wrote: "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error: the scope of the agreement *actually made* always measures the conspiracy and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, *so be it that they fall within the common purposes as he understood them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.*" 142 F. 2d 503, 507. (Emphasis supplied).

491 (3rd Cir. 1961); *United States* v. *Crosby,* 294 F. 2d 928, 945 (2d Cir. 1961); *United States* v. *Barrow,* 229 F. Supp. 722, 734 (E. D. Pa., 1964).

It makes eminent sense to say that a member of a conspiracy need not know each detail of membership or content in order to be held responsible for them. In that sense, almost every conspiracy has an "indefinite outline." [12] But the shift from deceitful to violent means is no such mere detail. That shift involves the commission of a new crime—and one of an entirely different nature. And the shift is particularly radical where, as in this case, it would have subverted the original understanding. For good reasons then, Judge Hand made plain in *Andolschek* that it is reversible error to attribute partnership in one venture upon no more than evidence of partnership in another.

The abuse in this case of Judge Hand's "indefinite outline" language becomes even clearer when compared with another of his statemnts on conspiracy law. In *United States* v. *Crimmins,* 123 F. 2d 271 (2d Cir. 1941), the Second Circuit reversed a conviction for conspiracy to transport stolen securities in interstate commerce, even though there was sufficient evidence that the defendant had agreed to handle the stolen securities. There was no evidence, however, that the defendant knew of or would have tolerated the interstate traffic alleged.

Judge Hand ruled that absent such evidence, the defendant, clearly a partner in the venture, could not

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[12] It is also possible, of course, that some conspirators may agree to a plan of "indefinite outline"—one in which any means may be used to achieve a given end. See *United States* v. *Crimmins,* 123 F. 2d 271, 273 (2d Cir. 1941). But there was no evidence whatever of such an agreement in this case.

be held responsible for the *means* his co-conspirators used that made the venture a federal conspiracy:

> "It is *never permissible* to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. . . . In the case at bar it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been, he could have been found guilty of the conspiracy, for such an agreement would have dealt with the place of the theft, even though it did no more than provide that the place made no difference. A continued indifference to the source of the bonds, coupled with knowledge that in some cases they had come from beyond the state, would have been evidence of such an agreement. But that was not the situation. . . . The jury might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make." *United States* v. *Crimmins, supra,* at 273. (Emphasis supplied).

In short, in the absence of *evidence* that Crimmins would have tolerated an open-ended venture of "indefinite outline", he took no "chances" that the interstate acts of others would supply the required federal element in a conspiracy case against him. Likewise, petitioner Battaglia cannot be held to have taken "his chances" on threats or violence, for there was *no evidence* that he made an open-ended agreement to tolerate any means that others might use. The required federal element—threats or violence—was supplied against petitioner only by turning the careful language of

Learned Hand to a purpose that Hand would have found repugnant.[13]

B. Unlawful Expansion of Federal Criminal Jurisdiction

If this Court permits the "indefinite outline" theory to prevail, it will also have licensed an insidious device for expanding the reach of federal criminal jurisdiction beyond Congressional intent. In this case, a required federal element under the Hobbs Act, wholly missing from the evidence, was supplied by that bootstrap theory. In the next conspiracy case, the theory may be used again to defeat Congressional intention by expanding the reach of yet another federal statute.

The Hobbs Act drew an unmistakably clear line around federal criminal jurisdiction. It includes certain kinds of violence and excludes non-violent activi-

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[13] The court also abused other language authored by Judge Hand. "Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied." In this context the "stake in the outcome" test is no more than a rephrasing of the "indefinite outline" theory: if a man has a stake in the outcome of a venture, he takes "his chances" on any *means* that may be used—*i.e.*, the venture necessarily has an "indefinite outline" as to means. Moreover, the "stake in the outcome" test was designed for an entirely different purpose—to hold that even if someone knows of an illegal consequence that will likely follow upon his own legal activity, he is not liable in conspiracy unless he also promotes the illegal venture and has a "stake in its outcome". 109 F. 2d at 581. The test has, therefore, always been regarded as addressing itself to the question of what "in addition to knowledge of the object is necessary to constitute agreement to accomplish it". See, *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920, 931. It was not designed to determine whether one who has knowledge of and a stake in the outcome of *a plan* is also responsible for *another plan* designed to achieve the same object.

ties.[14] Yet with no more than a twist of conspiracy law, the court below turned the Hobbs Act into a federal weapon against non-violent business activity.

Petitioner's activity may have fallen afoul of some state law. But he stands convicted under a federal law that was carefully drawn to leave questions about such activities to local law enforcement. We do not say here that Congress was constitutionally barred from bringing such conduct within the Hobbs Act.[15] But it chose not to do so, and this Court should not permit federal prosecutors to undo that choice. Such a usurpation of legislative prerogative is all the more sinister since it was achieved by inventing a doctrine of conspiracy law unfounded in precedent or policy. And this doctrine, in other statutory contexts, may

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[14] The heading of the statute presents the limitation: "Interference with Commerce by Threats or Violence". And the body of the statute, section (a), specifies that the federal ban extends only to interference "by robbery or extortion" and to one who "commits or threatens physical violence" in furtherance of such purposes. The definition paragraphs in section (b) define only "robbery" and "extortion", and each definition sounds in "force", "violence", and "fear of injury". The House Report on the bill, presented by Representative Hobbs, likewise plainly limits the statute's reach:

> "The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce, by robbery or extortion as defined in the bill . . . . The bill would outlaw *two* kinds of criminal interference with interstate commerce . . . ." (Emphasis supplied). H. Rep. No. 238, 79th Cong., 1st Sess.

[15] Congress has dealt with schemes to defraud private persons in another statute. 18 U.S.C. 2314. But even there it carefully limited Federal criminal jurisdiction to cases in which the person defrauded has been transported in interstate commerce, in execution or concealment of the scheme.

likewise be used to invade the domain of state authority in flat violation of Congressional intent.

Such invasions of state jurisdiction are not merely of technical concern. "Federal intervention also has a tendency to weaken the enforcement efforts of state authorities . . . ." That observation was made by Professor Louis B. Schwartz whom Congress has currently entrusted with direction of the National Comission on Reform of Federal Criminal Laws.[16] By creating that Commission, Congress has once again demonstrated its intent to insure the rationality of federal criminal jurisdiction and the proper allocation of law enforcement tasks as between the local and national governments.[17] These Congressional efforts to draw clean and sensible jurisdictional lines come to naught if those lines can be obliterated by the kind of conspiracy theory upon which this conviction rests.

2. DENIAL OF GRAND JURY TESTIMONY

In *Dennis* v. *United States,* 384 U.S. 855, this Court recognized the particular injustice done when *conspiracy defendants* are denied grand jury testimony of key government witnesses for purposes of cross-examination. Since "[a] conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants . . . it is especially important that the defense, the judge and the jury should have the assurance that the

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[16] The statute creating the Commission is Public Law 89-801, 80 Stat. 1516. Professor Schwartz is the executive director. His observation was made in the context of an article on *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 Law & Contem. Probs. 64, 70 (1948).

[17] That federal law enforcement activity should support, and not undermine, local incentive was a concern reflected as well in the report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* Chapter 13 (1967).

doors that may lead to truth have been unlocked." *Id.* at 873.

The wrongful attribution foreshadowed in *Dennis* came to pass here. Throughout the trial, counsel apprised the judge that no evidence had been presented to connect petitioner with the conspiracy charged. And, as in *Dennis*, "[t]he charge could not be proved on the basis of evidence exclusive of that" given by the key government witnesses—DiVito, La-Key and Riley—whose grand jury testimony was requested.[18]

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[18] The Court of Appeals stated that petitioner requested only DiVito's testimony. (App. 18a) Consequently, it limited its discussion to that denial. That denial alone warrants the granting of certiorari.

But the record, as a whole, shows that petitioner did not waive his claim with regard to La-Key and Riley. When counsel for Amabile moved for DiVito's grand jury testimony on cross-examination, the court asked him for authorities in support of the motion. (R. 195). Shortly thereafter, the court stated that the research need not be done since the motion would be denied. Counsel for petitioner then adopted the motion and cited *Dennis* in support. The court immediately reiterated the denial. (R. 233).

Later, counsel for Amabile moved for La-Key's grand jury testimony on cross-examination. But the judge summarily denied the motion in words strongly suggesting that he would not entertain such motions with respect to any witness (R. 390):

> "I think we have already told—perhaps it wasn't you but another lawyer. I deny your motion".

Nevertheless, counsel for Amabile moved for Riley's testimony on cross-examination later on. Again the court denied the motion summarily. (R. 689). Thus, counsel for petitioner permitted Amabile's lawyer to move for production and explicitly adopted the first motion. It would have been futile to repeat these motions with respect to each witness since it was apparent that the trial judge was not willing to hear argument on *Dennis* or consider the matter in any detail. Under such circumstances, repetition of the motion would only have exposed counsel to ridicule in the eyes of the jury. See 1 Wigmore, *Evidence*, 318, 331 (3d Ed. 1940); *City of Pittsburgh* v. *F.P.C.*, 239 F. 2d 741, 748 (D.C. Cir. 1956); *Sanchez* v. *United States*, 293 F. 2d 260, 265 (8th Cir. 1961).

384 U.S. at 872. Moreover, just as in *Dennis,* "[t]he testimony of the . . . witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. When the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements". 384 U.S. at 872-3. And as in *Dennis,* "[t]wo of the witnesses [here DiVito and La-Key] were accomplices . . . A third . . . [here Riley] had reasons for hostility toward" petitioner. 384 U.S. at 873. Petitioner's counsel brought the *Dennis* case to the attention of the trial judge in connection with one request. (R. 233). But the judge, disregarding *Dennis,* denied access to any grand jury testimony.

By approving that denial, the Seventh Circuit set itself in open conflict with three Circuits that have held a defendant's request at cross-examination sufficient to require disclosure of a witness' grand jury testimony. *United States* v. *Youngblood,* 379 F.2d 365, 368-70 (2nd Cir. 1967); *Schlinsky* v. *United States,* 379 F.2d 735, 740 (1st Cir. 1967); *Cargill* v. *United States,* 381 F.2d 849, 852 (10th Cir. 1967). Two other circuits, however, were allied with the Seventh in declining to adopt that reading of *Dennis. National Dairy Products Corp.* v. *United States,* 384 F.2d 457, 461 (8th Cir. 1967); *Allen* v. *United States,* 390 F.2d 476 (D. C. Cir. 1968).

Subsequent to this case, in co-defendant Amabile's appeal, the Seventh Circuit has changed its position and aligned itself with the First, Second, and Tenth Circuits. *United States* v. *Amabile,* No. 16314 (7th Cir. 1968). But the conflict among the circuits remains vivid.

Moreover, the Seventh Circuit promulgated its *Amabile* reading of *Dennis* prospectively so that its rule applies only to trials commencing after the date of the *Amabile* judgment on appeal. (App. 57a) Whatever the right of the Circuits to time their own rulings, they should not be permitted so to control the rulings of this Court. In any event, pure prospectivity of the sort imposed here is particularly inappropriate since the use of grand jury testimony in cross-examination affects "the very integrity of the fact-finding process", *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966)—the chief criterion the Court has used in rejecting requests for prospective application: *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Jackson* v. *Denno,* 378 U.S. 368 (1964). And in this case, the *Dennis* holding was presented to the trial judge as the law at the time of trial. (R. 233). Under these circumstances, the *Linkletter* form of prospective application is the very least that should be required. See 381 U.S. at 622 and Note 5.

Even if the Court wishes to let the circuit conflict ripen further, however, the presence of the disclosure question in this case should be regarded as an added reason for the grant of certiorari.[19] Although *Dennis* does not require a showing of prejudice, an illustration of the damage done should be of interest to the Court in its consideration of the first question presented. The novel doctrine of conspiracy law questioned therein enabled the prosecution to fasten responsibility upon the petitioner for threats of violence made by others.

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[19] Even if petitioner is regarded as having moved only for DiVito's testimony, the question is squarely presented on this record. See Note 18, *supra.*

The transcript of Riley's grand jury testimony, made available at the later *Amabile* trial, reveals that Riley made no mention of the threats of violence alleged to have occured prior to 1964.[20] (App. 68a-101a). Yet he testified to these threats at trial to support the reasonableness of his fear. The transcripts also show that Amabile referred to *himself* as "the man" in a meeting with Riley concerning work on another project. (App. 81a) Hence, if petitioner had been granted access to this transcript in cross-examining Riley, he could have weakened Riley's credibility in general, attacked the reasonableness of his alleged fear, and controverted Riley's statement that he knew petitioner as "the man". Riley's grand jury testimony was, therefore relevant to the critical issue—the threats and petitioner's connection with them. Accordingly, the denial of petitioner's disclosure motion deprived him of a significant means for testing whatever underpinnings there were for the novel conspiracy theory that alone supported his conviction.

3. CROSS-EXAMINATION AS TO RESIDENCE

In the following setting, petitioner's counsel was denied the opportunity to cross-examine Riley, a key government witness, as to his residence at the time of trial: (R. 723)

> Q: Where do you live now, Mr. Riley?
> [Government]: I will object, your Honor and I ask to be heard out of the presence of the jury.
> The Court: Without a hearing, I will sustain the objection.

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[20] The transcript of Riley's grand jury testimony was disclosed in *United States* v. *Amabile*, #67 CR 86, and it is reproduced in the Appendix. It was also included in petitioner's appendix to his petition for rehearing in the Court of Appeals.

As this Court held in *Smith* v. *Illinois,* 390 U.S. 129 (1968), such a denial deprived the petitioner of his right under the Sixth Amendment to confront the witnesses against him. *Smith* reaffirmed the Court's holding in *Alford* v. *United States,* 282 U.S. 687 (1930), requiring reversal of a federal conviction "because the trial judge had sustained objections to questions by the defense seeking to elicit the 'place of residence' of a prosecution witness . . ." 390 U.S. at 132.

Petitioner relied upon the *Alford* case on appeal and presented the intervening *Smith* case to the Court of Appeals on rehearing.[21] The government argued that the trial court had sought to protect the witness from further threats or violence. This argument was without support in the record since the trial court had refused to hold a hearing and, indeed, violence was attributed to the petitioner only by virtue of the unwarranted conspiracy theory challenged in the first question presented herein. Moreover, only Justices White and Marshall of this Court endorsed an exception to this Court's holding in their *Smith* concurrence. 390 U.S. at 133-34. And even these Justices would have required a hearing at trial so that the "judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling." *Id.* at 134. Since the defense was not heard on the matter at trial, it can hardly be contended that the trial judge properly assessed whatever competing factors he would have to weigh even if the *Smith* concurrence were the law.

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[21] Since *Alford* was law at trial and only reaffirmed in *Smith,* no question of prospective application of *Smith* is presented in this case.

Since the majority opinion in *Smith* does not suggest that it is ever permissible to deny a defendant knowledge of a government witness' current residence, a summary reversal of the judgment in this case is appropriate. If, however, the Court intended a more limited rule, oral argument would be appropriate to air the issue.[22]

4. ELECTRONIC EAVESDROPPING

Prior to trial, the petitioner moved for a hearing to determine the existence and extent of electronic eavesdropping. The motion was denied and throughout the case the government avoided a hearing by relying upon its unilateral review policy, condemned by this Court in *Kolod* v. *United States,* 390 U.S. 136 (1968).

After *Kolod,* petitioner filed a motion to remand to the District Court for "an adversary proceeding" comporting with this Court's requirement. In response, the government finally admitted that it had violated petitioner's privacy. It submitted to the Court of Appeals a sealed exhibit containing the "transcript of certain overheard conversations involving defendant Battaglia". (App. 44a). The Court of Appeals denied the motion to remand on the ground that it had conducted an *in camera ex parte* inspection of the submitted materials and had found them irrelevant.

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[22] If a rule of "special circumstances" was intended, the Court should note that, just as in *Alford* and *Smith,* the defense was otherwise prevented from fully exploring Riley's relationship to the government, including the possibility of reward for his testimony. (R. 617-18). See also *United States* v. *Amabile* (App. 47a). Cf. concealment of the witness' real name in *Smith,* 390 U.S. at 130, and the possibility of immunity reward in *Alford,* 282 U.S. at 693.

This procedure flatly violates this Court's directions in *Kolod*. Indeed, on motion to amend the *Kolod* order, the government itself has argued that the trial judge, intimately familiar with the proceedings, should be given the initial opportunity to determine the relevancy of the illegally obtained material. Memorandum for the United States, filed April, 1968, in No. 133 O.T. 1967. Moreover, a trial court adversary hearing would present an opportunity to determine whether the government's presentation of the materials is complete. Given the record of government reluctance in this case, petitioner should not be denied that opportunity.

Petitioner joins in opposition to the government's motion to amend the *Kolod* order. But even if the Court should grant the motion, the judgment in this case should be vacated and the cause remanded to the District Court for an appropriate hearing with the right preserved to seek further appellate review.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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